

The Appeals Board adopts the stipulations listed by the Administrative Law Judge in the Award.

### **ISSUES**

Respondent has requested review of the decision by the Administrative Law Judge in the following issues:

- (1) Whether claimant's injury arose out of and in the course of employment.
- (2) Whether claimant should be considered barred from recovery of benefits on the grounds that the injury was substantially caused by the claimant's intoxication.

Claimant disputes the specific contentions made by respondent and also argues that the appeal should be dismissed on grounds that the Workers Compensation Appeals Board selection process is unconstitutional.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After consideration of the arguments of the parties and review of the record the Appeals Board finds that the decision of the Administrative Law Judge should be affirmed. The Appeals Board finds, as did the Administrative Law Judge that claimant has sustained his burden of establishing ten percent (10%) permanent partial general disability resulting from an accident arising out of and in the course of his employment.

Claimant was injured in a motor vehicle accident while driving from the job site to his home. Claimant and a co-worker had been assigned responsibilities away from the primary job site at White Lakes Mall on the morning of the day the accident occurred. When they returned to the job site they were instructed to go to lunch and return after lunch to determine their next duties. Upon their return they found that the crew had left the job site. Claimant testified that he and the co-worker were traveling to his home to make a phone call to the company office to find out where they should go next at the time the accident occurred.

Respondent contends that the accident did not arise out of and in the course of his employment because there was no need to travel home. Respondent produced testimony that notes had been left at the job site directing claimant and his co-worker to an additional job in North Topeka. The Appeals Board finds, however, that claimant's accident did arise out of in the course of his employment. The finding is made in large part because there is no evidence in the record which convincingly contradicts claimant's testimony about the reason for traveling home. Claimant's supervisor testified it was not uncommon for employees to go home to make such a call. He testified that they would be considered in the course of their employment in doing so. The evidence also established that employees were paid while traveling from one job site to the next.

The Appeals Board also finds that the evidence does not establish that the accident was substantially caused by intoxication. The investigating officer, Officer Cochran, does testify that, in his opinion, claimant was intoxicated at the time of the accident. No field test or other sobriety test were performed. More importantly, however, there is no convincing evidence that the accident was caused by the intoxication. The accident report and other testimony indicate that claimant struck a vehicle which pulled improperly in front of the claimant from a driveway. Officer Cochran does testify to his conclusion that the intoxication was a substantial factor. However, he does not give any detail or any

explanation for that conclusion. The Appeals Board finds his conclusion, by itself, unconvincing.

The only testimony regarding nature and extent of claimant's disability was that given by Dr. Penn. He placed no restrictions on the claimant as a result of the accident but gives his opinion that claimant has, as a result, a ten percent (10%) permanent partial impairment.

Finally, the Appeals Board denies claimant's request to dismiss the appeal. Claimant argues that the appointment process for the Appeals Board is unconstitutional. The Appeals Board was appointed pursuant to statutes enacted by the legislature. That enactment is presumed constitutional. Blue v. McBride, 252 Kan. 894, 850 P.2d 852 (1993). The Appeals Board, therefore, will continue to perform its responsibilities unless directed otherwise by a court of competent jurisdiction.

For above reasons the Appeals Board finds that the decision of Administrative Law Judge should be and the same is hereby affirmed in all respects.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the decision of the Administrative Law Judge be and the same is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Mark W. Works, Attorney at Law, 118 SE 7th, Suite 100, Topeka, KS 66603  
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